IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RANDY DALE INGMIRE, Petitioner.	2 CA-CR 2006-0225-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-31132

Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

Clay Hernandez — Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 In this petition for review, petitioner Randy Dale Ingmire challenges the trial court's order denying him post-conviction relief based on *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), which he claims was a significant change in the law as contemplated by Rule 32.1(g), Ariz. R. Crim. P., 17 A.R.S. Ingmire contends that, based on *Davis*, the trial court should have found Ingmire's prison terms totalling 47.5 years on convictions of two counts of second-degree burglary, three counts of third-degree burglary, and one count each

of unlawful killing of livestock, theft by control, and possession of a weapon by a prohibited possessor to be cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and article II, § 15 of the Arizona Constitution. We will not disturb the trial court's ruling absent an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Ingmire was convicted of these offenses after a jury trial. He was sentenced to presumptive prison terms; some were concurrent, others were consecutive, and together, they totaled 57.5 years. Ingmire sought post-conviction relief pursuant to Rule 32, challenging the sentences and claiming trial counsel had been ineffective. The trial court granted relief in part, finding two of the prison terms should have been concurrent and modifing the terms so they totaled 47.5 years. Ingmire's petition for review of the denial of relief on the ineffective assistance claim was consolidated with his appeal. This court affirmed the convictions and sentences on appeal but refused to consider the issues raised in the petition for review because Ingmire had failed to state with specificity the issues he wanted to preserve in his motion for rehearing, which was required at the time by former Rule 32.9 before it was amended in 1992. *State v. Ingmire*, Nos. 2 CA-CR 91-0221; 2 CA-CR 92-0454 (consolidated) (memorandum decision filed July 20, 1993).

¶3 In a second post-conviction proceeding, Ingmire maintained Rule 32 appellate counsel had been ineffective for failing to properly preserve his right to have this court review the post-conviction ruling. The trial court granted relief, and as a result, Ingmire obtained delayed review of the previous post-conviction ruling. Addressing the merits of

Ingmire's claims, this court denied relief. *State v. Ingmire*, No. 2 CA-CR 2000-0409-PR (memorandum decision filed July 3, 2001). Thereafter, Ingmire apparently filed a petition for writ of habeas corpus in federal court based on ineffective assistance of counsel, but the district court denied relief in April 2004, as did the Ninth Circuit Court of Appeals in Feburary 2005.

¶4 In this, Ingmire's third post-conviction proceeding, he claimed, inter alia, that the prison terms imposed, both individually and when considered in the aggregate because of the consecutive terms, are grossly disproportionate to the offenses he committed and unconstitutionally excessive. He argued these were all property offenses, committed when he was only seventeen years old. Ingmire claimed he should not be precluded from raising this challenge to the sentences because, in *Davis*, the supreme court overruled its earlier decision in *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996), in which it had held that in making the threshold determination of whether a sentence is grossly disproportionate and potentially unconstitutional, a court could not consider the individual circumstances and facts of the case. Ingmire argued that, based on the test articulated by the supreme court in *Davis* and applied again in *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006), his sentences are cruel and unusual and violate the state and federal constitutions.[1]

[1]As Ingmire points out, our supreme court has made it clear that the same jurisprudence applicable to determining whether a sentence violates the federal prohibition against cruel and unusual punishment applies to determining whether a sentence is unconstitutional under the state constitution's counterpart provision. *See State v. Noble*, 171 Ariz. 171, 173, 829 P.2d 1217, 1219 (1992); *see also State v. Davis*, 206 Ariz. 377, ¶ 12, 79 P.3d 64, 67-68 (2003).

¶5 The trial court implicitly agreed with Ingmire that *Davis* was a significant change in the law and that his claim was not precluded. *See* Ariz. R. Crim. P. 32.2. The court found the proper analysis for determining whether a sentence is unconstitutionally excessive was set forth in *Davis* and further elucidated in *Berger*. But the court denied Ingmire relief after applying the proper analysis. The trial court concluded that Ingmire had "failed to show that his sentence imposed by the Court was grossly disproportionate."

¶6 On review, Ingmire first maintains the trial court ruled correctly when it "accepted" his argument that *Davis* was a significant change in the law and addressed the claim on its merits, rather than finding it precluded by Rule 32.2. But we are not convinced. Ingmire was convicted and sentenced in early 1991. He sought post-conviction relief for the first time in 1992. Although this court denied review of that petition, we decided Ingmire's appeal in July 1993. Among the issues he raised on appeal was the propriety of the consecutive prison terms. By that time, the United States Supreme Court had decided *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680 (1991), the seminal case on the analysis applicable to determining whether a sentence is unconstitutionally cruel and unusual. Indeed, before we decided Ingmire's appeal, our supreme court had reconsidered its decision in *State v. Bartlett*, 164 Ariz. 229, 792 P.2d 692 (1990), in light of *Harmelin*, as the Supreme Court had instructed. *See State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992). The supreme court did not decide *DePiano* until 1996.

¶7 In *Davis*, the supreme court attempted to clear the murky waters engendered by *DePiano* and, as Ingmire concedes on review, followed "the plurality opinion in

Harmelin." As Ingmire states, "[a]fter considering the whole of the Supreme Court's guidance, the *Davis* Court reversed *DePiano*'s rule and held that courts should consider the particular facts and circumstances of the case at bar." We think *Davis* simply returned the analysis to what it had been before it decided *DePiano* but after the Supreme Court decided *Harmelin*. *Davis*, like *Berger*, attempted to provide a "'path'" that would be more "'clear . . . for courts to follow.'" *Davis*, 206 Ariz. 377, ¶ 29, 79 P.3d at 70, *quoting Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S. Ct. 1166, 1173 (2003). Therefore, Ingmire could have previously raised the same challenge to his sentences that he raises now. As the supreme court noted in *Berger*, "*Davis* represents an 'extremely rare case' in which the court concluded prison sentences were grossly disproportionate. In so holding, the court observed that a sentence violates the Eighth Amendment if it is 'so severe as to shock the conscience of society.'" 212 Ariz. 473, ¶ 38, 134 P.3d at 385, *quoting Davis*, 206 Ariz. 377, ¶ 49, 79 P.3d at 75. The court in *Berger* added: "This language, however, must be understood as a restatement of the court's conclusion that the sentences were 'grossly disproportionate' under the standard set forth in the plurality opinions in *Harmelin* and *Ewing* [*v. California*, 538 U.S. 11, 123 S. Ct. 1179 (2003)], which *Davis* expressly followed. Davis was not suggesting a different standard." 212 Ariz. 473, ¶ 38, 134 P.3d at 385. Thus, *Davis* was not a significant change in the law for purposes of Rule 32.1(g) to the extent that it overruled *DePiano*, which did not exist when Ingmire appealed.

¶8 In any event, Ingmire has not persuaded us the trial court abused its discretion by denying relief on this claim on its merits. Although it is troubling that Ingmire committed

the offenses at the age of seventeen; that these were property crimes, and more violent crimes against persons potentially carry lesser sentences; and that one of his codefendants purportedly received probation, Ingmire has not established the trial court's analysis of this claim was incorrect. The trial court expressly applied the correct test, relying to a large degree on *Berger*, as well as on *Harmelin* and the Supreme Court's more recent decision in *Ewing*. The trial court's conclusion that Ingmire had failed to make the requisite threshold showing that his sentences are grossly disproportionate is sound; consequently, Ingmire was not entitled to a full proportionality review involving intra-jurisdictional and inter-jurisdictional comparisons. As the court stated in *Berger*: "This court reviews Eighth Amendment challenges under the framework outlined by Justice Kennedy in his concurring opinion in *Harmelin* and later employed by Justice O'Connor in announcing the judgment of the court in *Ewing*." 212 Ariz. 473, ¶ 11, 134 P.3d at 380-81. The court added, "Under this analysis a court first determines if there is a threshold showing of gross disproportionality by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *Id.* ¶ 12, *quoting Ewing*, 538 U.S. at 28, 123 S. Ct. at 1179 (alteration in *Berger*).

¶9 Ingmire acknowledges that, in *Berger*, the court stated that "'[e]ighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.'" *Id.* ¶ 28, *quoting United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). And, the *Berger* court continued, "[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to

another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Id*. But, Ingmire argues, simply because the court in *Berger* did not find a sentence to be excessive because of the cumulative effect of consecutive terms, it "does not disturb the court's duty to examine the individual case." Although that may be true, it renders Ingmire's argument less compelling.

¶10 We note, too, that, in *Berger*, the court pointed out that although in *Davis* it had considered the effect of the consecutive nature of the thirteen-year-terms, it had concluded the sentences in *Davis* were cruel and unusual after considering the specific circumstances of the case, reaffirming that "the court 'normally will not consider the imposition of consecutive sentences in a proportionality inquiry.'" *Berger*, 212 Ariz. 473, ¶ 42, 134 P.3d at 386, *quoting Davis*, 206 Ariz. 377, ¶¶ 47-48, 79 P.3d at 74-75. Because the trial court considered Ingmire's claim in light of *Berger* and *Davis*, Ingmire has not established the court abused its discretion.

¶11 We grant the petition for review. But, for the reasons stated, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge